PPC 9524.1989(03)

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MEMORANDUM

SUBJECT: Postponement of a Land Treatment Demonstration for Navajo Refining Company, Artesia, New Mexico Authorized by the New Mexico Environmental Improvement Board

FROM: Joseph S. Carra, Director
Permits and State Programs Division (OS-300)

TO: Allyn M Davis, Director
Hazardous Waste Management Division (6H)

This memorandum is in response to your request of December 29, 1988 for guidance on certain permitting issues related to land treatment facilities. You mentioned that the questions arose because the New Mexico Environmental Improvement Board delayed the start date of a land treatment demonstration for an interim status land treatment unit owned by Navajo Refining Company. As you explained in your memorandum, the postponement occurred as follows:

1. On January 22, 1988, the State of New Mexico issued a two-phased permit to the facility in which it required that the land treatment demonstration phase (Phase I) be effective for a period of one year from the effective date of the permit unless terminated, revoked, or reissued.

2. On March 22, 1988, Navajo Refining Company appealed the state-issued permit and requested a de novo hearing, which was held on May 31, 1988. In its appeal, Navajo Refining submitted Proposed Findings and Reasons which alleged that the Board has the authority to reverse a decisions of a Director under various circumstances. Navajo suggested that the Board change the start date of the treatment demonstration Phase I period to a later date.

3. On August 12, 1988, the Board considered the appeal and tentatively decided to postpone the start date of the land treatment demonstration until August 8, 1990. EPA stated its opposition to delaying the demonstration, but the Board nevertheless rendered its final decision to postpone the start date of the Phase I land treatment demonstration until August, 1990.

You asked several questions about the status of the facility and the state appeal. Because New Mexico is an authorized State, your questions are governed by New Mexico law, and we have no reason to comment on state law matters. In addition, most of your questions appear to be of a generic nature about land treatment demonstrations and permitting. We have answered your questions in a similarly non-facility-specific vein, assuming that federal law is applicable. We emphasize that our comments do not analyze the Navajo Refining situation as a matter of applicable state law.

1. Can a permit be appealed based on reasons other than those received during the public comment period?

Yes. Section 124.19 of the RCRA regulations governs who may appeal a RCRA permit under federal law. That section provides that any person who filed comments on a draft permit or participated in the public hearing may petition the Administrator to review any condition of the permit decision. Section 124.19 does not limit the subject matter of the appeal unless the person failed to file comments or participate during the public hearing on the draft permit, in which case the person may only petition for review to the extent of the changes from the draft to the final permit decision. Note, however, that New Mexico state law could differ significantly from _124.19.

2. Is the permit a legally enforceable document if it does not require the land treatment demonstration until a future date?

Under federal regulations at _270.63, the Agency may issue a two-phase facility permit, such as the permit issued to Navajo Refining, to a facility with a land treatment unit. Such a permit becomes effective, thus enforceable, according to the procedures in _124.15, that is, 30 days after issuance unless a later date is provided in the permit or the permit is appealed. Under federal law, the effective date of a treatment demonstration phase would not affect the effective date of the facility permit.

3. Can a permit be issued for Phase II without Phase I being implemented first?

Yes. As discussed above, the federal regulations at _270.63 provide for issuance of a two-phase permit to a facility with a land treatment unit. Such a permit normally contains general facility standards and two portions related to the land treatment standards of Subpart M. The first portion, Phase I, provides for the treatment demonstration; the second, Phase II, contains conditions to attempt to meet all Subpart M requirements based on substantial, yet incomplete or

inconclusive information submitted in Part B of the permit application (see _270.63(b)). As is disscussed above, all portions of the permit are issued at once, and the "facility" permit becomes effective per _124.15. The Phase I portion becomes effective as provided in the permit. The Phase II portion becomes effective only after the Phase I treatment demonstration is completed and, based on the results of the Phase I treatment demonstration, all necessary permit modifications are made per _270.63.

4. What is the regulatory status of a facility when a two-phase permit is issued under _270.63?

Under federal law, a facility is "permitted" once the permit goes into effect. At that time, the facility becomes subject to general facility standards under Part 264 as well as corrective action provisions of the permit. The land treatment unit is subject to the standards of Part 264 insofar as it is used for the treatment demonstration, the remainder of the unit complies with interim status standards until Phase II of the permit goes into effect pursuant to _270.63(d).

5. Can EPA require a treatment demonstration through the HSWA omnibus provision?

At the time that the HSWA portion of the permit was issued, the Agency could have required a treatment demonstration using omnibus authority if such a requirement were necessary to protect human health and the environment. However, whether the omnibus authority is appropriate for use after initial permit issuance, such as when a permit is renoticed as a result of changes made in response to an appeal, is an issue still under consideration by EPA at this time.

6. Is a State's administrative process for changing a permit to reflect a different start date for the land treatment demonstration subject to major modification requirements including public notice and opportunity for comment?

The State's administrative process is a matter of state law. Under federal law, any change made as the result of an appeal decision need not be made as a permit modification because the contested portion of the permit has not yet become a final permit decision under _124.15. However, if the change is substantial, then public notice and opportunity for comment may be advisable. Once the permit becomes effective, any change to it must be made as a permit modification. If the State has procedures similar to the previous federal major/minor modification system, a change of the start date for a land treatment demonstration would likely be a major modification and subject to public notice and comment.

7. Can EPA prompt a State to require the land treatment demonstration by providing comments pursuant to _271.19 if and when the State opens the permit for a major modification that proposes a delayed start date?

Comments under _271.19 are intended to assure that a state permit meets authorized state law permitting standards. We should comment pursuant to _271.19 if the state modification does not comport with authorized state law. On the issue of delaying treatment demonstrations at interim status land treatment units, as a matter of federal policy we do not favor delayed start dates, particularly since Congress clearly indicated that land disposal units should be under permitting standards by November of 1988. Therefore, it is appropriate for us to file comments urging the State not to allow the delay. However, if the delay is permissible under authorized state law, and the State chooses to exercise its discretion under authorized state law and allow the delay, our comment cannot by itself support enforcement action under _271.19 as there will be no violation of law to enforce. It is the law that our comment identifies, not the comment itself, that imposes obligations with which facilities must comply. It should be noted that unwarranted delays in implementing permitting standards could result in a state program that is less stringent than the federal program.

I hope this information about federal law related to land treatment facilities helps to answer your questions about the Navajo facility. If you have any further questions, please call Barbara Foster at FTS 382-4751.